In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 43

STANLEY MARKIS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 64

ALBERT P. MORETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

As we advised the Court in our Supplemental Memorandum in *Schipani* v. *United States*, No. 504, this

Term, 385 U.S. 372, the government has been conducting an extensive review to ascertain whether illegal monitoring affected any cases which had been brought to trial. We have recently been advised by the Internal Revenue Service that wiretapping took place in the two above-captioned cases and we have concluded, for the reasons set forth below, that this conduct may have affected the convictions.

Petitioner Markis was convicted by a jury on a two-count indictment charging him with violating 26 U.S.C. 7203 by willfully failing to purchase the occupational gambling tax stamp required by 26 U.S.C. 4411 and by willfully failing to register as required by 26 U.S.C. 4412. He was sentenced to imprisonment for one year and fined $10,000 on the first count, and he received a suspended sentence and probation for two years on the second count.

Petitioner Moretti was convicted upon his plea of *nolo contendere* to the first count of a two-count information charging him with violating 26 U.S.C. 7203 by willfully failing to purchase the occupational tax stamp and by willfully failing to register. He was sentenced to imprisonment for four months and probation for two years, and fined $3,000. The second count was dismissed on the government's motion.

Beginning in early 1964 internal revenue agents, who placed numerous bets with one John Mento at the latter's service station, saw Mento dial telephone number 336-0254, ask for "Joe" or "Stash," and repeat the bet. Telephone company records disclosed that the number was an unlisted one in the name of

"Mrs. Peggy D'Onofrio," Apartment C-6, 2225 Main Street, Bridgeport, Connecticut, and investigation by revenue agents disclosed no person of that name living at that address. The agents, however, observed petitioner Markis (whose name they did not know at the time)[1] regularly unlock the apartment and enter it at 11:00 or 11:30 a.m., carrying pads, scratch sheets and newspapers, and remain until 4:45 p.m.; the time Markis spent at the apartment was the usual period of the day for placing and accepting bets by telephone (Gov. C.A. App. 3a-7a). The records of the district Internal Revenue office disclosed that only eight persons in the State of Connecticut possessed wagering tax stamps at the time, and that none of them resided or had a place of business in Bridgeport (Gov. C.A. App. 8a-9a).

Meanwhile the agents received information that petitioner Moretti was accepting bets on the same floor of the same apartment building. Because of the coincidence of location, an agent of the Internal Revenue Service, some time in July, 1964, tapped the telephone of both apartments. So far as we can determine, no written or other record was made of any of the information obtained. The agent who conducted the wiretap could not identify any of the persons involved in the overheard conversations, but did orally inform the agent-in-charge that bets were being accepted in each of the two apartments by two separate persons.

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[1] Petitioner was later introduced by the nickname "Stash" to an agent who placed bets with Mento (Pet. App. 2a-3a).

Further investigation was conducted with respect to the two petitioners. On the basis of recitations referring to the results of this further investigation, search warrants were thereafter obtained for both apartments. The warrants were executed in early October 1964. The affidavits in support of the warrants did not disclose that there had been wiretapping. Petitioners' pretrial motions to suppress the evidence obtained during the ensuing searches were denied. Petitioner Moretti then entered a plea of *nolo contendere;* petitioner Markis was tried and convicted. The searches produced evidence used against petitioner Markis at trial and evidence which could have been used against petitioner Moretti if he had not pleaded *nolo contendere.* Both petitioners appealed and their convictions were affirmed. Both then filed petitions for writs of certiorari and the government filed memoranda in opposition. The cases are still pending in this Court.

Although none of the conversations overheard by means of wiretaps were offered as evidence against petitioners at trial or in obtaining the search warrants, the information obtained from the wiretap confirmed the agents' belief that both petitioners were engaging in gambling without a federal tax stamp. Also, the knowledge gained by the wiretapping apparently facilitated the continuing investigation and the procurement of the information recited in the affidavits presented in support of the application for the search warrants. Thus we cannot say with assurance that the evidence obtained by these searches was untainted. We therefore conclude that it would be appropriate for the Court to grant certiorari in these

two cases, vacate the judgments of the court of appeals, and remand the causes to the district court for a new trial, should the government seek to prosecute petitioners anew.[2]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1967.

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[2] Petitioners are two of approximately forty-five individuals arrested on October 8, 1964, in connection with a coordinated campaign against violators of the Wagering Tax statute in the Bridgeport, Connecticut, area. A number of the individuals whose indictments resulted from these raids ultimately filed petitions in this Court. The case of petitioner Marchetti, No. 38, this Term, is *sub judice*; petitions for certiorari in Nos. 41, 44, 55, 56, and 27 Misc., this Term, are presently pending. Investigation discloses that there was no illegal monitoring affecting any of the defendants in these cases and that the monitoring described in the text provided no leads with respect to any of them.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

MARKIS *v.* UNITED STATES; AND MORETTI *v.* UNITED STATES.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 43 and 64. Decided May 29, 1967.

PER CURIAM.

The petitions for writs of certiorari are granted, the judgments vacated and the cases remanded to the United States District Court for the District of Connecticut for a new trial, should the Government seek to prosecute petitioners anew. *Nardone* v. *United States*, 302 U. S., 379; *Nardone* v. *United States*, 308 U. S. 338.